Public Prosecutor v Chandrasegaran Sunthiran

HIGH COURT (TAIPING) — CRIMINAL APPLICATION NO AB-44–10–05 OF 2019
MUNIANDY JC
14 FEBRUARY 2020

Criminal Procedure — Jurisdiction of court — Functus officio — Accused identified himself as MS from time he was arrested for murder, right throughout his trial and even during his failed attempts to set aside his conviction and sentence on appeal — Name and identity card number MS used in fact belonged to his stepbrother — Accused applied for new identity card ('IC') while on 'death row' — Investigations by National Registration Department ('NRD') revealed he had no birth certificate ('BC') and was in fact 'Santhiran Segar' — NRD issued accused BC and IC with new name ('CS') — Public prosecutor ('PP') applied to court for leave to amend the name MS to CS in warrant of commitment under sentence of death ('WC') issued by trial court — Whether court had power to do so as it was functus officio after it convicted and sentenced MS — Whether allowing the amendment tantamount to amending the judgment of the trial court — Whether such amendment precluded by s 278 of the Criminal Procedure Code — Whether s 278 only allowed rectification of clerical errors in judgment — Whether WC correctly issued in name of MS as that was the name CS used at all material times — Whether the name-change did not vitiate the conviction and sentence or render the WC bad

The instant case was a strange one where a person convicted and sentenced to death for murder had maintained a false identity right from the time he was arrested by police for the crime, throughout his trial and the appeal process, until the time he was sitting in 'death row' at Taiping prison waiting for execution of his sentence. It was only then that he suddenly decided to apply for 'a new identity card'. Until then, he identified himself as Maniam a/l Santhiran ('MS') having NRIC No A1255336. The name and the identity card number actually belonged to his stepbrother. When the National Registration Department ('NRD') acted on his application and started investigating, they discovered that he was not MS but 'Segar' or 'Santhiran Segar' and that he had no birth certificate. The NRD recorded a late registration of his birth and issued him an identity card in the name Chandrasegaran Sunthiran ('CS') NRIC No 670502–08–6549. Within two months of getting his birth certificate and identity card, CS applied for a writ of habeas corpus to be released from prison immediately on the ground that he was not the convicted person named in the warrant of commitment under sentence of death ('the WC') which the trial court had issued to the prison authorities. CS claimed his

continued detention at the prison was illegal. Meanwhile, the public prosecutor ('PP') filed the instant application for leave to amend the WS to change the name of the convicted person therein from MS to CS. The instant court heard both the habeas corpus and amendment applications together and dismissed the former (against which an appeal was filed by CS to the Federal Court pursuant to s 374 of the Criminal Procedure Code). The present judgment concerned the PP's application for leave to amend the WC.

Held, dismissing the PP's application:

(1) At all material times during the trial, the respondent was identified as the perpetrator of the crime, specifically by SP8 who testified that he saw him strangling the victim. That crime was proven against the respondent, as the accused, beyond reasonable doubt and that fact had not altered since (see paras 31–33).

(2) The WC was correctly issued in the name of MS as it was in that name that the respondent was arrested, investigated, charged, tried, convicted and sentenced for the offence of murder under s 302 of the Penal Code. The respondent's procurement of a new identity card in the name of CS did not in any way alter that fact or vitiate the conviction of MS, which was the identity that CS had used at all material times. The name change and issuance of a new identity card took place way after the appellate courts had affirmed the conviction and sentence (see paras 21, 29, 36 & 38).

(3) Both the principles of res judicata and functus officio applied. The matter was res judicata as far as the criminal case against CS was concerned. The case had already been adjudged and the final judgment of the Federal Court was conclusive against him. It had been proven beyond reasonable doubt that it was he who had used the name MS and committed the murder as charged and was found guilty, convicted and sentenced by a court of competent jurisdiction and the conviction and sentence had survived the entire appeal process. The issue could not be re-litigated as CS, who had used the name MS, had not been wronged but was accorded a fair trial and went through a two-pronged appeal process. The respondent was therefore not improperly or illegally detained following the conviction and sentence. Corollary to that, the High Court was functus officio when it convicted and sentenced him. The WC issued in the name of MS was valid under the law pursuant to s 281(a) of the Criminal Procedure Code ('the CPC') and this court had no power to amend the WC into the name of CS (see paras 22–24 & 37).

(4) The leave application to amend the WC was not premised on any accidental slip, clerical error or arithmetical error. There was no error. The judgment was intended by the High Court to be against MS. The WC was valid and proper and issued pursuant to the trial, conviction and

A sentence of the respondent who had identified himself throughout as MS. Hence, there was no legal basis to call for the WC to be altered. Amending the WC in the manner proposed would tantamount to modifying or altering the judgment handed down on MS (who was in fact CS) and that was not allowed by s 278 of the CPC (see para 29).

B

[Bahasa Malaysia summary

Kes semasa adalah sangat ganjil di mana seseorang yang telah disabitkan dan dijatuhkan hukuman mati kerana membunuh telah menggunakan identiti palsu sejak beliau ditangkap oleh polis kerana melakukan jenayah tersebut, sepanjang perbicaraan dan proses rayuan beliau, sehingga beliau ditempatkan di penjara 'hukuman mati' di Taiping sementara menunggu hukuman dijatuhkan. Pada masa tersebut, barulah beliau secara tiba-tiba memutuskan untuk memohon 'kad pengenalan baru'. Sebelum daripada itu, beliau mengenalkan diri beliau sebagai Maniam a/l Santhiran ('MS') yang mempunyai kad pengenalan A1255336. Nama dan nombor kad pengenalan tersebut sebenarnya adalah milik abang tiri beliau. Apabila Jabatan Pendaftaran Negara ('JPN') bertindak atas permohonannya dan mula menjalankan siasatan, mereka mendapati bahawa beliau bukanlah MS tetapi 'Segar' atau 'Santhiran Segar' dan bahawa beliau tidak mempunyai surat beranak. JPN merekodkan pendaftaran lewat kelahiran beliau dan mengeluarkan kad pengenalan dengan nama Chandrasegaran Sunthiran ('CS') No Kad Pengenalan 670502–08–6549. Dalam tempoh dua bulan setelah mendapatkan surat beranak dan kad pengenalannya, CS memohon writ habeas corpus supaya dibebaskan dari penjara serta merta dengan alasan beliau bukanlah orang yang disabitkan dengan kesalahan yang dinamakan dalam waran komitmen bagi hukuman mati ('WK') yang telah dikeluarkan oleh mahkamah perbicaraan kepada pihak penjara. CS mendakwa penahanannya yang berterusan di penjara adalah tidak sah. Dalam masa yang sama, pendakwa raya ('PR') telah memfailkan permohonan semasa untuk kebenaran meminda WK untuk menukar nama orang yang disabitkan dengan kesalahan dari MS ke CS. Mahkamah semasa mendengar kedua-dua permohonan habeas corpus dan pindaan bersama-sama dan menolak permohonan pertama (yang mana rayuan terhadapnya telah difailkan oleh CS ke Mahkamah Persekutuan berdasarkan s 374 Kanun Tatacara Jenayah). Penghakiman semasa ini berdasarkan kepada permohonan PR untuk mendapat kebenaran untuk meminda WK.

Diputuskan, menolak permohonan PR:

(1) Pada masa-masa material semasa perbicaraan, responden dikenal pasti sebagai pelaku jenayah, khususnya oleh SP8 yang memberi keterangan bahawa beliau melihatnya mencekik mangsa. Jenayah tersebut dibuktikan terhadap responden, sebagai tertuduh, tanpa keraguan yang munasabah dan fakta itu tidak pernah berubah sejak daripada itu (lihat perenggan 31–33).

(2) WK dikeluarkan dengan tepat atas nama MS kerana dengan nama itulah responden ditangkap, disiasat, didakwa, dibicarakan, disabitkan dan dijatuhkan hukuman atas kesalahan membunuh di bawah s 302 Kanun Keseksaan. Dapatan responden bagi kad pengenalan baru atas nama CS sama sekali tidak mengubah fakta tersebut atau merosakkan sabitan MS, yang merupakan identiti yang digunakan CS sepanjang masa. Perubahan nama dan pengeluaran kad pengenalan baru terjadi setelah mahkamah rayuan mengekalkan sabitan dan hukuman (lihat perenggan 21, 29, 36 & 38).

(3) Kedua-dua prinsip res judicata dan functus officio diguna pakai. Perkara tersebut adalah res judicata terhadap kes jenayah CS. Kes tersebut telah dibicarakan dan penghakiman oleh Mahkamah Persekutuan adalah muktamad terhadapnya. Ianya telah terbukti tanpa keraguan yang munasabah bahawa beliau yang menggunakan nama MS dan melakukan pembunuhan tersebut seperti pertuduhan dan telah didapati bersalah, disabitkan dan dijatuhkan hukuman oleh mahkamah yang mempunyai bidang kuasa yang kompeten dan sabitan dan hukuman telah bertahan sepanjang proses rayuan. Isu tersebut tidak akan dibicarakan semula sebagai CS, yang telah menggunakan nama MS, tidak dikhilafkan tetapi dibicarakan secara adil dan menjalani dua cabang proses rayuan. Oleh itu, responden tidak ditahan secara tidak wajar atau tidak sah atas sabitan dan hukuman. Selari dengan itu, Mahkamah Tinggi adalah functus officio apabila ia telah mensabitkan dan menjatuhkan hukuman terhadap beliau. WK yang dikeluarkan atas nama MS adalah sah berdasarkan s 281(a) Kanun Tatacara Jenayah ('KTJ') dan mahkamah ini tidak memiliki kuasa untuk mengubah WC menjadi nama CS (lihat perenggan 22–24 & 37).

(4) Permohonan kebenaran untuk meminda WK bukanlah berdasarkan kesilapan yang tidak disengajakan, kesalahan perkeranian atau kesalahan aritmetik. Tidak ada ralat. Penghakiman Mahkamah Tinggi tersebut adalah terhadap MS. WK tersebut adalah sah dan sempurna dan dikeluarkan berdasarkan perbicaraan, sabitan dan hukuman responden yang telah mengenalkan dirinya sebagai MS. Oleh itu, tidak ada asas undang-undang untuk meminda WK. Pindaan WK sebagaimana cara yang dicadangkan akan mengubah atau mengganti keputusan yang telah dijatuhkan kepada MS (yang sebenarnya adalah CS) dan ianya tidak dibenarkan oleh s 278 KTJ (lihat perenggan 29).]

Cases referred to

AS Naidu v The State of Madhya Pradesh [1975] CriLJ 498, HC (refd)
Datuk Harun bin Haji Idris v Officer-in-Charge, Pudu Prison [1981] 2 MLJ 72, FC (refd)
Gurdit Singh v PP [1983] 1 MLJ 264, HC (refd)
Hatton v Harris [1892] AC 547, HL (refd)

May, Re (1885) 28 Ch D 516, CA (refd)
Milson v Carter [1893] AC 638, PC (refd)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332, HC (refd)
R v Dwight [1990] 1 NZLR 160, CA (refd)
R v Michael [1976] QB 414, QBD (refd)
R v Saville [1980] 1 All ER 861, CA (refd)
VGM Holdings Ltd, Re [1941] 3 All ER 417, Ch D (refd)
Sambasivam v The PP, Federation of Malaya [1950] 1 MLJ 145, PC (refd)
Smt Sooraj Devi v Pyare Lal (1981) CriLJ 296, SC (refd)
Swire, In re (1885) 30 Ch D 239, CA (refd)
The Crown v Habibullah & Anor 1950 AIR (Lah) 50, HC (refd)
Thynne (Marchioness of Bath) v Thynne (Marquess of Bath) [1955] 3 All ER 129, CA (refd)

Legislation referred to

Criminal Procedure Code ss 277, 278, 281(a), 292(1), 365, 374
Courts of Judicature Act 1964
Code of Criminal Procedure 1973 [IND] ss 362, 368
Penal Code s 302

Zaid Abdul Malek (Melisa Sasidaran with him) (Daim and Gamany) for the accused.
Muhammad bin Sinti (Senior Federal Counsel, Attorney Generals' Chambers) for the public prosecutor.

Muniandy JC:

PREFACE

[1] As backdrop, there are two applications in the case involving the respondent which were heard together by this court. The subject matter of this appeal pertains Criminal Application No AB-44–10–05 of 2019, wherein the public prosecutor vide application dated 16 May 2019 prays for leave to make an application to alter and amend the name and identity card number ('IC') on the warrant of commitment ('WC') under sentence of death with serial No 23904 dated 14 September 2006, from Maniam a/l Santhiran ('MS') NRIC No A1255336, who is currently a prisoner in the death row to Chandrasegaran a/l Sunthiran ('CS') with NRIC No 670502–08–6549. The application is supported by the affidavit of Hj Azhar bin Mokhtar affirmed on 16 May 2019 together with six other affidavits (see encls 2, 3, 4, 8, 9, 10, 11 to Application No AB-44–10–05 of 2019).

[2] The other Criminal Application No AB-44–9–05 of 2019 is by Chandrasegaran a/l Sunthiran ('CS') with NRIC No 670502–08–6549, the

respondent to the present application, for a writ of habeas corpus. The said application was dismissed by this court. He has appealed to the Federal Court against that decision pursuant to s 374 of the Criminal Procedure Code (Act 593). The full text of the judgment in that matter is annexed to this judgment as an Annexure. Substantial part of this judgment also forms part of that judgment by this court.

[3] It is emphasised that since both the applications (AB-44–9–05 of 2019 and AB-44–10–05 of 2019) were heard together, the affidavits filed for the said applications are by necessity relevant reference in this judgment.

WHO IS MS?

[4] MS is the accused who was arrested, investigated, charged and tried for an offence of murder at the Taiping High Court for committing an offence of causing the death of Salachee a/p Muniandy (NRIC No 261120–08–5308).

[5] MS was tried, convicted and sentenced to death by the Taiping High Court on 14 September 2006 vide Perak Criminal Trial No 45–3–02. At all material time during the criminal trial at the High Court and his appeal to the Court of Appeal and Federal Court, he had identified himself as Maniam a/l Santhiran with IC No A1255336.

[6] MS had appealed against the said conviction and sentence by the Taiping High Court to the Court of Appeal and thereafter to the Federal Court. Both the Court of Appeal and our apex court upheld the conviction and sentence of death passed by the High Court. With that the conviction and sentence of death passed on MS stays. MS is now incarcerated at the Taiping prison.

RELATIONSHIP BETWEEN MS AND CS

[7] As a *bolt out of the blue,* CS applied for a writ of habeas corpus for him to be released from further detention at the Taiping prison. Instead of using his name as MS, he now uses the name CS. His application is premised on the following grounds:

(a) he is not Maniam a/l Santhiran (MS) as arrested, investigated, charged, tried, convicted and sentenced to death by the High Court at Taiping, vide Perak Criminal Trial No 45–3–02, which was upheld by the Court of Appeal (Criminal Appeal No A-05–125 of 2006) and Federal Court (Criminal Appeal No 05–142 of 2009(A));

(b) that he is in fact Chandrasegaran a/l Sunthiran ('CS');

(c) this is so because he has now obtained a new identity card with No 670502–08–6549; and

(d) thus he prays for his release pursuant to s 365 of the CPC as he finds his further detention at the prison to be illegal, since he is not MS as identified in the WC but now CS.

[8] To the contrary, the respondents to the writ of habeas corpus application, namely, *Pengarah Penjara Taiping* and *Kerajaan Malaysia,* contends that CS is in fact the accused MS who was arrested, investigated, charged, tried, convicted and sentenced to death by the High Court at Taiping vide Perak Criminal Trial No 45–3–02. The conviction and sentence was later upheld on appeal to the Court of Appeal vide Criminal Appeal No A-05–125 of 2006 and Federal Court vide Criminal Appeal No 05–142 of 2009(A).

[9] It was CS, the applicant, whom on his own volition had applied for a new identity card via the National Registration Department (Jabatan Pendaftaran Negara (JPN) being its malay equivalent) when its officials visited Taiping Prison. Chronology of events leading to the issuance of the new identity card as tabulated based on the affidavits filed for both the application, by Nurul Hidayah bt Ismail, senior assistant registrar of High Court Taiping, is provided below:

14 September 2006	Mahkamah Tinggi Taiping mendapati pemohon bersalah dan menyabitkan pemohon dengan kesalahan di bawah s 302 Kanun Keseksaan kerana membunuh Salachee a/p Muniandy (261120–08–5308). Mahkamah Tinggi Taiping menjatuhkan hukuman gantung sampai mati.
29 Oktober 2009	Mahkamah Rayuan menolak rayuan pemohon terhadap sabitan kes di Mahkamah Tinggi Taiping.
4 Julai 2011	Mahkamah Persekutuan menolak rayuan pemohon terhadap sabitan kes di Mahkamah Tinggi Taiping.
29 September 2014	Pemohon telah memohon untuk penggantian kad pengenalan lama (No A 1255336) kepada kad pengenalan baru kepada pihak Jabatan Pendaftaran Negara (JPN). (Rujuk afidavit Ahmad Firdaus bin Che MD Rose yang diikrarkan pada 13 Jun 2019 — lampiran 11 kepada Permohonan No AB-44–09–05 Tahun 2019)
12 Mac 2015	Pihak JPN memaklumkan pihak Penjara Taiping bahawa permohonan pemohon ditangguhkan kerana nombor kad pengenalan pemohon merujuk orang lain dalam rekod JPN. Unit mobile JPN akan membuat gantian kad pengenalan kepada banduan-banduan Penjara Taiping pada 13 Mac 2015 dengan disertai pegawai penyiasat dari Bahagian Siasatan dan Penguatkuasaan (BSK) JPN Perak. (Rujuk eksh 'YY-2(1)' kepada afidavit Yaman bin Yaacob yang diikrarkan pada 13 Jun 2019 — lampiran 10 kepada Permohonan No AB-44–09–05 Tahun 2019)

13 Mac 2015	Pihak BSK JPN hadir ke Penjara Taiping membuat siasatan ke atas pemohon. Siasatan dijalankan ke atas pemohon yang mana pemohon mengaku menggunakan maklumat abang tirinya Maniam a/l Santhiran nombor kad pengenalan 660404–02–5735/A1255336.	A
	Pemohon menyatakan bahawa nama sebenar pemohon adalah Segar dan mengaku telah menggunakan maklumat abang tirinya sebagai pengenalan diri semasa ditangkap oleh pihak polis.	B
	(Rujuk eksh 'AF-1' kepada afidavit Ahmad Firdaus bin Che MD Rose yang diikrarkan pada 13 Jun 2019 — lampiran 11 kepada Permohonan No AB-44–09–05 Tahun 2019)	C
5 Februari 2016	Pihak Penjara Taiping pohon penjelasan dari pihak JPN melalui surat berkenaan status permohonan kad pengenalan baru pemohon.	
	(Rujuk eksh YY-2(2) (Surat bertarikh 5 Februari 2016) kepada afidavit Yaman bin Yaacob yang diikrarkan pada 13 Jun 2019 — lampiran 10 kepada Permohonan No AB-44–09–05 Tahun 2019)	D
8 Mac 2016	Pihak Penjara Taiping menerima surat bertarikh 23 Februari 2016 dari JPN yang memaklumkan bahawa hasil siasatan BSK JPN telah mendapati pemohon adalah seorang penyamar kepada nombor kad pengenalan 660404–02–5735/A1255336 atas nama Maniam a/l Santhiran. Nama sebenar pemohon adalah Segar yang merupakan adik tiri kepada Maniam a/l Santhiran. Segar mengaku telah menggunakan maklumat abang tirinya sebagai pengenalan diri semasa ditangkap oleh pihak polis.	E F
	Sehubungan dengan itu, pihak JPN membatalkan permohonan pemohon untuk penggantian kad pengenalan baru dan Unit Rekod Penjara Taiping bersetuju untuk membantu suspek membuat permohonan daftar lewat kelahiran di JPN.	G
	(Ekshibit AF-1 (surat bertarikh 23 Febrauri 2016)) kepada afidavit Ahmad Firdaus bin Che MD Rose yang diikrarkan pada 13 Jun 2019 — lampiran 11 kepada Permohonan No AB-44–09–05 Tahun 2019)	H
11 Mac 2016	Laporan polis Taiping Rpt 2028/16 dibuat menyatakan bahawa pemohon telah dikenalpasti oleh JPN bahawa beliau merupakan penyamar kepada nombor kad pengenalan A1255336/660404–02–5735 atas nama Maniam a/l Santhiran.	I
	(Ekshibit 'YY-3' kepada Afidavit Yaman bin Yaacob yang diikrarkan pada 13 Jun 2019 — lampiran 10 kepada Permohonan No AB-44–09–05 Tahun 2019)	

26 April 2017	Keputusan Carian JPN (JPN.LM14) menunjukkan bahawa nama pemohon adalah Santhiran Segar a/l Santiran. (Ekshibit AF-2 kepada afidavit Ahmad Firdaus bin Che Md Rose yang diikrarkan pada 13 Jun 2019 — lampiran 11 kepada Permohonan No AB-44–09–05 Tahun 2019)
24 Disember 2018	JPN telah mendaftarkan sijil kelahiran (JPN.LM15) pemohon dengan nama Chandrasegaran Sunthiran nombor kad pengenalan 670502–08–6549. (Ekshibit YY-9 kepada afidavit Yaman bin Yaacob yang diikrarkan pada 13 Jun 2019 — lampiran 10 kepada Permohonan No AB-44–09–05 Tahun 2019)
19 Mac 2019	JPN Daerah Kerian telah mengeluarkan sijil kelahiran pemohon (DU57006) dengan nama Chandrasegaran Sunthiran dan pemohon mendapat kad pengenalannya dengan nombor 670502–08–6549. (Ekshibit YY-9 kepada afidavit Yaman bin Yaacob yang diikrarkan pada 13 Jun 2019 — lampiran 10 kepada Permohonan No AB-44–09–05 Tahun 2019)
15 Mei 2019	Pemohon memfailkan notis usul untuk memohon perintah writ habeas corpus dikeluarkan terhadap pemohon agar pemohon dibebaskan serta merta.

[10] Thereafter a new IC was issued. With the issuance of the IC, there is now a change of name and identity card number of the accused in Perak Criminal Trial No 45–3–02; appellant to the appeal at the Court of Appeal No A-05–125 of 2006; appellant to the appeal at the Federal Court No 05–142 of 2009(A). The change is from Maniam a/l Santhiran ('MS') with IC No A1255336 to Chandrasegaran a/l Sunthiran ('CS') with IC No 670502–08–6549.

[11] Hence, for all intents and purposes, CS had identified himself as MS at all material time from the time of arrest, investigation, charge, trial, sentence and appeal.

[12] The change of name and IC number came about much later, when he represented to the JPN officials that he had identified himself as MS, when he was in fact CS.

[13] This fact is fortified by his own testimony at the High Court during his trial, when he testified as witness, DW1 in the name of MS (see p 82 of exh 'MS1' to *afidavit tambahan* of Muhammad bin Sinti dated 27 August 2019 — encl 27 to Application No AB-44–9–05 of 2019). It is also his evidence that he did not have an IC of his own (see pp 94–95 of exh 'MS1' to *afidavit*

tambahan of Muhammad bin Sinti dated 27 August 2019 vide encl 27 to Application No AB-44–9–05 of 2019).

[14] He admitted to have identified himself as MS, when he applied for a new IC. Although later he denied saying that, this court has to premise its finding on the affidavits deposed and filed in court. In a case of this nature which is to be decided on a contest on affidavits, the rule is material allegations which are not contradicted are deemed to be admitted. In this regard assistance is sought from the case of *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 at pp 333–334. Denial does not amount to contradiction. The finding by JPN, pursuant to its investigation is fortified by the advice given to CS to apply for a birth certificate ('BC') in order to obtain a new IC. The legitimacy of the investigation is followed by a police report (Taiping report 2028/16 — see exh 'YY3' to affidavit of Yaman bin Yaacob dated 13 Jun 2019 vide encl 10 to Application No AB-44–09–05 of 2019).

[15] He admitted to have used the name MS, who is his stepbrother. The real MS, has in fact deposed an affidavit to state that his name had been used by the applicant. He has also confirmed in the said affidavit that he was never arrested, investigated, charged, tried and sentenced for an offence of murder and maintained never to have committed such an offence of murder, as stated to be in his name. The said affidavit is filed in support of this application for leave from this court to amend the WC. The affidavit is deposed on 3 April 2019 (encl 3 to Application No AB-44–10–05 of 2019). The real MS stated as the following:

> 8. Saya sesungguhnya percaya dan menyatakan bahawa Responden telah menyamar identiti saya iaitu Maniam a/l Santhiran (Nombor Kad Pengenalan: A1255336/660404–02–5735) sepanjang masa perbicaraan di Mahkamah Tinggi Taiping, Mahkamah Rayuan Malaysia dan Mahkamah Persekutuan Malaysia, bagi kes-kes yang dinyatakan di perenggan 6, 7 dan 8, tanpa pengetahuan saya.

ISSUE ON INCORPORATION OF THE RECORD OF PROCEEDINGS OF THE HIGH COURT, COURT OF APPEAL AND FEDERAL COURT

[16] An application was made by the respondents to the writ of habeas corpus application, namely, *Pengarah Penjara Taiping* and *Kerajaan Malaysia,* (which is heard together with the present application) to incorporate the record of proceedings of the High Court, Court of Appeal and Federal Court. It was objected to by counsel for applicant on the ground that this court is not in a position to review the judgment of the High Court, Court of Appeal and Federal Court by perusing the records in order to determine that MS was in fact CS, during the trial, but to only consider the application by the applicant on

the sole basis, that he is not MS but in fact CS and in view of the change of his identity, he ought to be released from further incarceration at the Taiping prison.

[17] This court, after having heard lengthy submissions advanced by both counsel for applicant and respondent, had postponed the matter for a decision. After due deliberation of the matter, this court had allowed the application to incorporate the said record of proceedings, for the following reasons:

(a) the said record of proceedings, are not to be viewed in isolation but together with the application for a writ of habeas corpus and this application;

(b) the stark fact that the application for a writ of habeas corpus stems from the High Court proceeding which has survived the appellate process, needs no emphasis;

(c) by incorporating the said record of proceedings, the argument mounted against it, that it would be akin to or tantamount to altering or amendment of the earlier judgment of the superior courts is unfounded. This is so, as the incorporation of the records merely serve to *unfold the narrative* as to what has in fact happened in the case involving the applicant (CS now, and MS then). Further unfolding of the narrative is pertinent, both to the habeas corpus proceeding, as well as the application for leave to amend the WC;

(d) for sake of completeness, the incorporation of the said record of proceedings is fundamental as for all intents and purposes, the application for a writ of habeas corpus is entwined with the criminal trial of MS, which had survived the appellate process at the court of appeal and apex court; and

(e) moreover, the said record of proceedings, is not fresh and anew for both applications, as some parts of it has been incorporated in the affidavit filed in support of the application for a writ of habeas corpus (see exh 'MS1' to affidavit of Muhammad bin Sinti deposed on 13 June 2019 vide encl 9 to Application No AB-44–9–05 of 2019). Thus reference has in fact been made to some part of the said records in order to support the application for a writ of habeas corpus.

THE AFFIDAVITS FILED

[18] The affidavits deposed by *Pengarah Pendakwaan Negeri,* Azhar bin Mokhtar (see encl 2 to Application No AB-44–10–05 of 2019, and senior federal counsel, Muhammad bin Sinti (see encl 9 to Application No AB-44–9–05 of 2019) states the sequence of events pertaining criminal

case against the applicant, CS, who had at all material time identified himself as MS.

[19] The affidavit filed by the officials from Taiping prison and JPN are crucial as it provides a nexus to the missing link subsequent to the criminal trial and appeals of the applicant. It essays the events leading to the procurement of the birth certificate ('BC') and thereafter IC by the applicant. It also demonstrates application by the applicant on his own volition for the said identification documents after his conviction and sentence was upheld by the Court of Appeal and Federal Court, during his incarceration at Taiping prison, awaiting execution of the sentence of death.

[20] The affidavit by MS, who is CS's stepbrother filed in order to support this application for leave to apply to amend the WC fortifies the fact that the applicant, CS, has in fact identified himself as MS at all material time right from time of his arrest, trial, conviction, sentence and appeal. CS had used his stepbrother's name and identity without his knowledge at all material time.

[21] Surveying the contents of affidavits filed for and against both the application, the following is apparent:

(a) the applicant whose name is now CS had used the name MS, when he was arrested, investigated, charged, tried and sentenced to death;

(b) the WC was correctly issued in the name of MS, as it was in that name he was arrested, investigated, charged, tried, convicted and sentenced by the Taiping High Court for an offence of murder under s 302 of the Penal Code;

(c) the new IC issued to CS, which is his current name, was much later, as the change took place only on 24 December 2018, way after the conviction ordered and sentence of death pronounced on 14 September 2006, and upheld by the Court of Appeal and Federal Court on 29 October 2009 and 4 July 2011, respectively (see exhs 'S3' and 'S4' to affidavit of Hj Azhar bin Mokhtar deposed on 16 May 2019 — encl 2 to Application No AB-44–10–05 of 2019); and

(d) the procurement of new IC in the name of CS does not in any way alter the fact that it was him who had used the name MS, who was arrested, investigated, charged, tried, convicted and sentenced to death, ensuing a WC on him. Thus, his identity as an accused person throughout the trial and appeals has not altered a jot.

A FINDINGS

[22] In the upshot, the matter is res judicata as far as the criminal case against CS is concerned. The case is already judged and final judgment of the Federal Court is conclusive against him. On this doctrine, Brett MR in the case of *Re May* (1885) 28 Ch D 516, decided:

B

> It is a very substantial doctrine, and it is one of the most fundamental doctrines of all courts that there must be an end to all litigation, and that the parties have no right of their own accord, having tried a question between them, and obtained a decision of a court, to start that litigation over again on precisely the same question.

C

It was also decided in the Privy Council case of *Sambasivam v The Public Prosecutor, Federation of Malaya* [1950] 1 MLJ 145 at p 151, that the maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings.

D

The above resonates the fact that in every criminal trial, like as the one involving the applicant, there are two issues. They are, whether or not a crime has been committed and, whether or not the accused person committed it. In the case of the respondent, it has been proved beyond reasonable doubt that it is him who had used the name MS, who had committed the murder as charged and likewise the High Court at Taiping, a court of competent jurisdiction which had tried him for that offence, had found him guilty, convicted and sentenced him to death according to law. Further, the said conviction and sentence had survived the appeal process, whereby the apex court upheld the said conviction and sentence.

E

F

[23] Corollary to that, this court is functus officio, as it had finally disposed of the rights of the respondent when the conviction was ordered and death sentence pronounced and ultimately upheld by the Federal Court. Hence, this court, being the lowest in the hierarchy of the superior courts under the Courts of Judicature Act 1964 (Act 91), lacks legal competence to deal with the matter again as the apex court had put the matter to rest, when it had dismissed the appeal by the respondent against conviction and sentence (see *Black's Law Dictionary* (7th Ed) at p 1313 as well as *Re VGM Holdings Ltd* [1941] 3 All ER 417; *R v Dwight* [1990] 1 NZLR 160). Hence, the ensuing WC issued in the name of MS is valid under the law pursuant to s 281(a) of the CPC.

G

H

I

[24] To re-litigate the issue, would be an affront to justice, as CS, who had used MS, as his name, has not been wronged but accorded a fair open court trial and allowed a two prong appeal process, resulting in the conviction and sentence, upheld. This court does not have the jurisdiction and power to alter the final judgment pronounced against CS, who had used MS as his name

throughout the legal process, and on whom a WC is pending. The respondent CS, who had used MS as his name, is not improperly nor illegally detained when he was sentenced to death by the judge of the Taiping High Court. The case was properly brought before the said judge and tried by him. The conviction and sentence pronounced was not set aside but subsequently upheld by the Court of Appeal and Federal Court (see the case of *Gurdit Singh v Public Prosecutor* [1983] 1 MLJ 264).

[25] Hence, it is stark that the WC issued by the High Court, shall not be altered in view of s 278 of the CPC. It would be prudent at this juncture to quote the illuminating works of *Mimi Kamariah Majid, Criminal Procedure in Malaysia* (2nd Ed, University of Malaya Press, 1995), at pp 223–224. She had encapsulated the *raison d'etre* of s 278 of the CPC, in the following fashion:

> Section 278 concerns amendment to judgments. No court, other than a High Court, having once recorded its judgment, shall alter or review the same. Nevertheless, a clerical error may be rectified at any time and any other mistake may be rectified at any time before the court rises for the day. Other than technical errors, therefore, lower courts cannot amend their judgments once they are recorded. Only the High Court may do this. In the case of clerical errors any court may amend them at any time whereas in the case of 'other mistakes', amendment is allowed only until the court adjourns for the day. The 'other mistakes' may include a mix-up of accused persons and their respective offences and findings thereon.
>
> An interesting question which arises is whether the Federal Court or the Court of Appeal can amend judgments at any time? Does the High Court include the Court of Appeal and the Federal Court? The cases of *Re Datuk Harun bin Haji Idris* [1981] 1 MLJ 47 and *Datuk Harun bin Haji Idris v Officer in-Charge Pudu Prison* [1981] 2 MLJ 72 are relevant. Datuk Harun was convicted on three charges under the Prevention of Corruption Act 1961 and sentenced to one year's imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences to run concurrently. These sentences were confirmed on appeal. Subsequently, he was again convicted on two charges under the Penal Code and was sentenced to six months' imprisonment on the first charge and fined RM15,000 on the second charge. On appeal, the Federal Court enhanced the prison sentence on the first charge to four years and imposed a sentence of three years' imprisonment on the second charge, the sentences to run concurrently. Nowhere did the Federal Court mention whether these four years were to run concurrently or consecutively to the earlier two years.
>
> Datuk Harun commenced serving his sentence on 1 March 1978 and the warrants of commitment issued in respect of the offences did not mention whether both sets of sentences were to run consecutively or otherwise. Subsequently, on 29 August 1979 a second warrant of commitment was issued and backdated to 28 February 1978, with the additional words 'but these sentences to commence on the expiration of the sentence imposed' in the first case. Datuk Harun applied for a writ of habeas corpus claiming that he had been illegally confined in prison from 29 October 1980 as he had already completed serving his sentences as on the date, assuming the sentences in the two cases were concurrent.

Both the High Court and Federal Court discussed interesting points relating to powers of a superior court to rectify or amend its decisions, and the right of a person aggrieved to apply for a writ of habeas corpus against a decision of a court. When discussing the first issue, Hashim Yeop Sani J referred to s 278 of the Criminal Procedure Code. After quoting this section, His Lordship said that the section can be 'properly interpreted to mean that the superior courts can go beyond rectifying clerical errors and other mistakes'. 'Superior courts' in Malaysia will necessarily mean the High Court, Court of Appeal and the Federal Court. But, s 278 does not say 'superior courts' or even 'higher courts'; it merely says 'High Court'. Section 278 therefore did not include the then Federal Court. It will indeed be incongruous or ludicrous to assert that a High Court may rectify its mistakes whereas a Federal Court may not. It is for this reason that some English cases and the local case of *Chua Man How v Superintendent of Pudu Prison* [1980] 1 MLJ 219 have decided that the superior court or the Court of Appeal and Federal Court have the inherent power to remedy mistakes in its record. It is interesting to note that the Federal Court made no reference to this part of the High Court's decision, that is, s 278 of the Criminal Procedure Code grants powers to the Federal Court to rectify mistakes in its records. The Federal Court went straight on to the English cases of *Re Swire* (1885) 30 Ch D 239, *Thynne v Thynne* [1955] 3 All ER 129, *Michael* (1976) 1 QB 414 and *Saville* [1980] 1 All ER 861, which were also referred to by the trial judge. The Federal Court held that the learned trial judge 'was perfectly right to state that a superior court as a court of record has an inherent jurisdiction to remedy mistakes in its record, eg accidental omission' but declared this 'on the authorities'.

[26] Flowing from the above, the thrust of the decision in the case of *Datuk Harun Haji Idris v Officer-in-Charge, Pudu Prison* [1981] 2 MLJ 72, pertains amendment to a WC issued by the High Court after having convicted and sentenced an accused, which was upheld by the apex court. His Lordship Lee Hun Hoe CJ (Borneo) (as he then was) had categorically enumerated the permutations when a superior court has the jurisdiction and power to alter the WC and when it does not have such jurisdiction and power.

[27] On the premise, that the inherent power of the superior court is an extraordinary power which ought to be exercised fairly, cautiously and rarely and only when the court considers that the ends of justice require it, alteration of a WC *is allowed* in the following circumstances:

(a) if the alteration or amendment pertains the *manner of execution of the sentence* rather than the award of appropriate sentence according to law. Therefore, the direction to make the sentence awarded in a subsequent case to run concurrently with the sentence awarded in a case decided earlier does not amount to review of the judgment in which the subsequent sentence is passed. No modification of the judgment is involved, the power to make the two sentences run concurrently can be exercised at any time when the matter is brought to the notice of the court by an application or otherwise. The court cannot be said to have

become functus officio and as such not competent to exercise the power when the case has already been decided on merits whether on appeal or otherwise. It is an independent power conferred by s 292(1) of the CPC. When dealing with this issue, reliance is sought from the case of *AS Naidu v The State of Madhya Pradesh* (1975) CriLJ 498;

(b) a superior court of appeal could amend an order subsequently 'provided the amendment be made without injustice or on terms which preclude injustice'. This is an important power which the court ought to be able to exercise in a proper case *in order to put right something which is incorrectly stated and to keep its records in line with the real position.* Assistance is sought from the case of *In Re Swire* (1885) 30 Ch D 239;

(c) the court had power under its inherent jurisdiction to amend an order of the court after it had been drawn up and entered, *so as to make the position under it clear and free from ambiguity.* Reliance is placed on the case of *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] 3 All ER 129;

(d) the court has an inherent jurisdiction to amend or rectify any order recorded in its records *to make such record accord with the order intended by the court*. Reference made to the case of *R v Michael* [1976] QB 414 which had followed *R v Saville* [1980] 1 All ER 861;

(e) a superior court as a court of record has an inherent jurisdiction *to remedy mistakes in its record, eg accidental omission.* Reference is made to the case of *Milson v Carter* [1893] AC 638;

(f) accidental or inadvertent omission can always be corrected at any time. This is not a question of reviewing or altering sentences. *The warrant of committal can be amended to reflect the decision of the court*. An example was raised by reference to the case of *The Crown v Habibullah & Anor* 1950 AIR (Lah) 50, where in passing a death sentence the judge omitted to incorporate in his judgment statutory direction under s 368 of the Indian CPC (in pari materia with ours as in s 277 of the CPC) that 'the accused be hanged by the *neck till he is dead*' where it was held that as the words were inadvertently omitted the court had inherent jurisdiction to make the necessary correction. In that regard the case of *Hatton v Harris* [1892] AC 547 was referred, to state that such correction could be made after a lapse of 40 years; and

(g) a clerical error, may be rectified at any time and other mistake may be rectified at any time before the court rises for the day. A clerical error or arithmetical error (which is found in s 362 of the Indian CPC 1973 which is pari materia with our s 278 of the CPC, save for the use of the phrase 'arithmetical error') is to mean:

A clerical or arithmetical error is an error occasioned by an accidental slip or

omission of the Court. It represents that which the Court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on arguments or disposition. An arithmetical error is a mistake of calculation and a clerical mistake in writing or typing.

(See *Mallal's Criminal Procedure* (5th Ed) Malayan Law Journal, 1998, at para 9054 at p 4216 where reference is made to the case of *Smt Sooraj Devi v Pyare Lal* (1981) CriLJ 296; *Sohoni's Code of Criminal Procedure* (19th Ed, 1992) para 21 at p 3923).

[28] On the same premise, alteration of a WC is *not allowed* in the following circumstances:

(a) a judgment in a criminal case consists of the important elements: a finding on the charge and, in the case of conviction, the nature and quantum of sentence. The exercise of the power to amend shall not in any way *modify or alter the judgment in the case* in which the sentence has been awarded in as much as it does not affect the nature or quantum of sentence; and

(b) that *power did not extend so far as to allow the court to amend an effective part of its order.* Reliance made on the case of *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] 3 All ER 129.

[29] In view of the foregoing, it is crystal clear that leave sought to apply to amend the WC issued against MS is not premised on an accidental slip, a clerical error or an arithmetical error. The leave sought is to amend the name of the accused person who was sentenced to death by the Taiping High Court from MS to CS. In the first place, it is not an error but a valid and proper WC issued ensuing from the trial of MS who was convicted and sentenced by the High Court judge, at Taiping High Court. Hence, to call for its alteration defies legal basis. The WC issued shall not be truncated from the finding of guilt, conviction and sentence of death meted out on MS who was in fact CS, who did not apprise the trial court or appeal courts of his real identity. Hence, an amendment to the WC to now state the name on it as CS and backdating it will not cure the error of wrong identity as it would be an affront to justice for the following reasons:

(a) it was MS who was tried, convicted and sentenced, hence the WC in his name and identity card number used by him at that material time;

(b) the judgment was intended by the High Court to be against MS, after an open court trial against him. It is now known that CS had identified himself as MS, not only when he was testifying as a witness for his own defence (as DW1), but also when he was arrested and investigated. He was also positively identified as the accused who had committed the act

of murder by an eyewitness SP8 (see p 44 of exh 'MS1' to *afidavit tambahan* of Muhammad bin Sinti dated 27 August 2019 — encl 27 to Application No AB-44–9–05 of 2019). Hence the judgment pronounced by the High Court, subsequently upheld by the Court of Appeal and Federal Court is clear and unambiguous;

(c) the name MS, is an integral and effective part of the WC, which shall not be altered or amended;

(d) the amendment sought is not because the error is an accidental omission, clerical error or an arithmetical error but alteration of judgment which had been properly recorded against MS who is now CS;

(e) he identity issue does not vitiate the conviction of MS, whose identity was used by CS at all material time, since his arrest, investigation, charge, trial, sentence and appeal; and

(f) hence, If leave to amend is allowed, it tantamount to a modification and/or alteration of the judgment handed down on MS who was in fact CS, by the High Court at Taiping in Perak Criminal Trial No 45–3–02 which was upheld by the Court of Appeal vide case No A-05–125–2006 and by the Apex Court vide case No 05–142–2009(A). This would also be a breach of s 278 of the CPC and it will be at a tangent with the formidable array of authorities alluded to above and below.

[30] In the works of Judith Farbey and RJ Sharpe with Simon Atrill on *The Law of Habeas Corpus* (Oxford University Press, 2010) it is stated at pp 50 and 51:

> Where imprisonment follows a valid conviction, it will be virtually impossible to make out a successful case based on a defect in the committal documents (*Olson v The Queen* [1980] 1 SCR 808). Legislation in most jurisdictions requires the court to refuse the writ if there is a proper conviction which could support the detention. The source of so many habeas corpus proceedings in the nineteenth century has been effectively plugged. Even where no such statutory provision is applicable, it would seem that the court may refuse to order the release of the applicant where there is a valid conviction. *R v Governor of Lewes Prison, ex p Doyle* (1917) 2 KB 254. *Warrants of commitment tend now to be regarded as a piece of machinery to implement the court's order, and unless an error which vitiates the conviction itself is revealed, relief will be refused. See also R v Mount (1875) LR 6 PC 283.* (Emphasis added.)

CONCLUSION

[31] MS was charged, tried, convicted and sentenced to death for committing an offence of murder on Salachee a/p Muniandy.

[32] At all material time during the High Court trial, he was identified as the accused, specifically by SP8 who in fact saw MS strangling the victim.

A **[33]** The crime which is proved beyond reasonable doubt to have been committed by him, has not altered since, and later affirmed by the Court of Appeal and Federal Court.

B **[34]** It was only after affirmation of conviction and sentence; MS had applied for an IC. To obtain the IC, he had to kick start the entire process by applying for a BC (as he did not have one), before he could pursue with the application for IC. It was with assistance of Taiping prison and JPN officials, he managed to secure BC and IC. Thus it is also obvious that he did not have a BC upon birth, hence the quagmire.

C

[35] And now his name is CS with a new IC number. Although such, when he was arrested, investigated, charged, tried, convicted and sentenced to death, he had used the name and identity as MS.

D

[36] Upon sentence of death pronounced on him, the ensuing WC shall be in the name of MS as it was in that name he was charged, tried, convicted and sentenced. This is pursuant to the law as found in s 281(a) of the CPC.

E **[37]** When the High Court issued the WC, it is functus officio. The apex court has confirmed the conviction and sentence of death imposed on MS, whose identity was used by CS, the respondent. Hence this court does not have the power to amend the WC into the name of CS. This court too, did not allow the writ of habeas corpus as it would tantamount to be used as means of reviewing the decision of the High Court, court of appeal and our apex court. Moreover, a writ of habeas corpus does not apply where the applicant is awaiting execution under the judgment of a competent court.

F

G **[38]** The applicant has to be mindful of the stark fact that the WC was issued by virtue of s 281(a) of the CPC, following after sentence of death has been pronounced. This puts the whole case against CS, who had used the identity as MS to rest. The WC, which includes the identity of the respondent shall not be truncated from the entire process culminating into its issuance.

H

[39] Premised on the above reasons the application by the public prosecutor for leave to make an application to amend the warrant of commitment No 23904 under sentence of death dated 14 September 2006 in the name of Maniam a/l Santhiran (IC No 1255336) to Chandrasegaran a/l Sunthiran (IC No 670502–08–6549), the respondent, to this application is dismissed.

I

Application dismissed.

Reported by Ashok Kumar